ATVA Proposed Questions for Media Ownership Notice of Proposed Rulemaking

1. Separately owned broadcast stations in the same market today use a variety of arrangements—including local marketing agreements ("LMAs"), shared services agreements ("SSAs"), and joint sales agreements ("JSAs")—that can result in de facto transfers of control. We also are aware that local broadcast stations increasingly are affiliating with multiple national broadcast networks to deliver two or more programming streams either through multicasting, or through ownership of a low power or Class A station in the same market. Are sharing and/or multicasting arrangements inconsistent with the purpose and intent of our media ownership rules? Does the use of such sharing and/or multicasting arrangements undermine the public interest goals of advancing competition, localism, and diversity?

2. In our Retransmission Consent NPRM, we noted the increasing prevalence of competing broadcast stations' coordinated retransmission consent negotiations and sought comment on whether to prohibit such conduct. We understand that some broadcasters coordinate retransmission consent negotiations through legally binding contracts, such as LMAs, SSAs and JSAs, as well as through informal arrangements. We tentatively conclude that such coordination, whether formal or informal, harms competition among local broadcast stations. We seek comment on this conclusion. In addition to raising the price of retransmission consent fees and the cost of advertising, what other competitive harms result from coordinated negotiations and other forms of joint conduct? How do such arrangements impact localism and diversity in local broadcasting? Do the harms resulting from coordinated bargaining of broadcast carriage rights differ from the harms resulting from a station's dual affiliation with multiple broadcast networks? Should we reach the same conclusion with respect to a station's dual affiliation with multiple broadcast networks?

3. The Department of Justice previously determined that coordination among broadcasters in a local market to negotiate retransmission consent constitutes illegal price-fixing, finding that "the antitrust laws require that such rights be exercised individually and independently by broadcasters."[1] How should DOJ's conclusion in the antitrust context influence our determination of whether coordinated retransmission consent negotiations among separately owned stations in the same market reduces competition in the context of the broadcast ownership rules?

4. Our local television ownership rule prohibits a licensee from owning, operating, or controlling multiple stations in the same DMA unless certain specific conditions are met. 47 C.F.R. § 73.3555(b); *id.* Note 7. We tentatively conclude for purposes of this rule that a cognizable interest arises whenever a broadcaster engages in any of the following practices:

    a. delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA;
    b. delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party;

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[1] *United States v. Texas Television, Inc.* Civil No. C-96-64, Competitive Impact Statement at 8 (S.D. Tex. Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/texast0.htm.

c. any informal or formal agreement pursuant to which one broadcaster would enter into a retransmission consent agreement with an MVPD contingent upon whether another separately owned broadcaster in the same market is able to negotiate a satisfactory retransmission consent agreement with the same MVPD; and
d. any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

Relatedly, we tentatively conclude that when a local station affiliates with more than one Big Four network, it also violates the local television ownership rule unless a valid exception exists. We seek comment on these tentative conclusions. Should the Commission determine that the practice of separately owned broadcast stations in the same local market coordinating retransmission consent negotiations constitutes a combination subject to the limitations set forth in Section 73.3555(b) of the Commission's rules? Should the Commission determine that the practice of a single broadcast station affiliating with multiple national networks, either through a multicasting arrangement or ownership of a low power or Class A station affiliated with another network,[2] constitutes a combination subject to the limitations set forth in Section 73.3555(b) of the Commission's rules?

5. In addition, or in the alternative, should the Commission revise its methods for determining when an entity "own[s], operate[s], or control[s] two television stations licensed in the same [DMA]" to account for instances where (i) two broadcasters in the same market coordinate their bargaining of signal carriage with MVPDs and (ii) one broadcast station affiliates with multiple networks through a multicasting arrangement or ownership of a non-full power station? In terms of the harmful effects on competition, localism, and diversity, does a broadcaster's dual affiliation with multiple networks in a market differ in any material respect from the harmful effects of a broadcaster owning, operating, or controlling multiple stations in a market?

6. Our dual network rule prohibits a merger between or among any two or more of the Big Four national broadcasting networks by prohibiting a television broadcast station from affiliating with an entity affiliated with two or more Big Four networks. 47 C.F.R. § 73.658(g). Should the Commission determine that dual affiliation by a broadcast station, whether through multicasting or ownership of a low power or Class A station in the same market, is prohibited under the dual network rule? If not, should the Commission amend the dual network rule to achieve this result? In terms of the harmful effects on competition, localism, and diversity, does a broadcaster's dual affiliation with multiple networks in a local market differ from the harmful effects of a combination of two of the Big Four networks?

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[2] In at least 8 documented instances, a full power station affiliated with one Big 4 network has obtained common ownership of multiple Big 4 stations in the same market through ownership of another low power or Class A station in the same market that is affiliated with another Big 4 network. *See* In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, Comments of the American Cable Association (filed May 18, 2010) at Appendix C, 36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market, http://goo.gl/3t2jM.

7. What other steps should the Commission take to more effectively prevent and address the harms to competition, localism, and diversity resulting from broadcasters' coordinated negotiation of retransmission consent and/or dual affiliation? For example, should the Commission consider these practices in the context of license renewals?

8. Section 310(d) of the Act forbids broadcast stations from transferring *de facto* or *de jure* control over the station license, or any rights thereunder without prior Commission approval. 47 U.S.C. § 310(d). Traditionally, the Commission has focused on the ability to control finances, personnel and programming, which it has described as "the major concerns of station operation and decision making." *See, e.g., Stereo Broadcasters,* 87 F.C.C.2d 87 ¶29 (1981). Should the Commission determine that a national network's contractual right, to either (i) influence an independent affiliate's exercise of the right to grant retransmission consent, whether in the form of an outright prohibition, a network's prior "consent" or "approval" or "veto" right, or other means or (ii) receive a "cut" of an independent affiliate's retransmission consent fees, effectively transfers control over these core licensee functions and therefore violates this provision of the Act? In addition, or in the alternative, should the Commission determine that the existence of such network contractual rights gives the network a cognizable interest in the station, or violates a station's public interest obligations under Section 309 of the Act? What other steps should the Commission take to ensure that networks do not usurp an independent affiliate's control of its retransmission consent right and, more fundamentally, of the incidents of its station license?

9. We seek comment on the prevalence of coordinated retransmission consent negotiations, dual network affiliation through either a multicasting arrangement or ownership of another low power or Class A station in the same market, and network interference with independent affiliates in the marketplace today. How prevalent are sharing arrangements or informal practices that allow two or more stations in a single DMA to coordinate retransmission consent negotiations? How prevalent are multicasting arrangements whereby one station in a single DMA controls the signal of multiple national broadcast networks? How often are sharing and multicasting agreements used in combination with one another in a single DMA? How prevalent are network reservation of contractual rights to influence the station's grant of retransmission consent included in the affiliation agreements between the broadcast network and an independent affiliate? How often are such rights exercised within the context of retransmission consent negotiations between an independent station and an MVPD? How often do affiliation agreements include a network contractual right to a portion of an independent affiliate's retransmission consent fees?